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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973.

73-223

S. E. NICHOLS SHILLINGTON CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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S. E. Nichols Shillington Corp.,

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v.

National Labor Relations Board,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to view the judgment of the United States Circuit Court Appeals for the Third Circuit entered on the above e on May 2, 1973.

Opinion Below.

The U. S. Court of Appeals, Third Circuit, rendered opinion but issued a judgment order. This judgment der, as well as the decision and order of the National bor Relations Board and the Trial Examiner's de- ion, are set forth in an appendix at the end of this tition.

Question Presented.

s an employee who has committed wilful misconduct otected against discharge because the misconduct arose the course of attempting to organize a union?

The facts are admitted. An employee in an active retail department store, in the middle of the store's operating hours, called a meeting of between 10 and 15 clerks, held in the store but away from their work areas. These clerks manned between 40 and 50% of the entire store area. The meeting lasted for a period of ten to twenty minutes.

The store manager, to the knowledge of the offending employee, was absent from the store, but discharged the employee the next day.

Prior to the discharge there is no allegation or proof of anti-union animus.

Previously the Board has held that wilful misconduct will not be condoned even though its purpose is to foster a union. *N.L.R.B. v. Barberton Plastics* (CCA-6), 354 F. 2d 66; *N.L.R.B. v. J. P. Stevens,* 167 N.L.R.B. (#37).

Two Circuit Courts of Appeal have likewise held that a purpose of union organization is not a defense against discharge for wilful misconduct. *Huber v. N.L.R.B.* (CCA-5), 223 F. 2d 748; *N.L.R.B. v. Park Edge Sheridan Meats* (CCA-2), 341 F. 2d 725.

Reasons for Granting the Writ.

As part of the judicial evolution of employees' rights while organizing unions and the rights of business enterprises to carry on activities without undue interference, it was early held by this Court that the National Labor Relations Act does not interfere with an employer's inherent right to operate his business including the right to discharge if the discharge was motivated by reasons associated with efficient conduct of his business. *N.L.R.B. v. Jones & Laughlin,* 301 U. S. 1.

The Board by the appealed decision and others has and is ruling directly contrary to *Jones & Laughlin.* The Board no longer requires showing of an anti-union animus but concludes that since the employee was active in union organization and is discharged, *ipso facto,* regardless of normal business conduct, the discharge was motivated primarily to discourage union organization.

Conclusion.

For the reason set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JAMES L. BURKE,
Attorney for Petitioner,
315 Lake Street,
Elmira, N. Y. 14901

APPENDIX OF DECISIONS.

Judgment Order of the Court of Appeals, Third Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

S. E. NICHOLS SHILLINGTON CORP.,

Respondent.

No. 72-1538

ON APPLICATION OF ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Submitted Under Third Circuit Rule 12(6) April 9, 1973

Before:

Adams and Gibbons, *Circuit Judges* and Joseph S. Lord, III, *District Judge.*

Peter G. Nash, General Counsel.
Patrick Hardin, Associate General Counsel.
Marcel Mallet-Prevost, Assistant General Counsel.
Elliott Moore, Ronald I. Tish, Attorneys.
National Labor Relations Board.
James L. Burke, 315 Lake Street, Elmira, New York 14901, Attorney for Respondent.

After considering the respondent's contention that the National Labor Relations Board erred in finding that the S. E. Nichols Shillington Corp. violated Sections 8(a)(1) & (3) of the National Labor Relations Act, we find that there is substantial evidence on the record as a whole to support the Board's finding that the Company violated Sections 8(a)(1) & (3) of the Act by discharging employee, Rosemary Stamm, because of her union activities, and it is

ORDERED AND ADJUDGED that the Order of the National Labor Relations Board in this matter be enforced. Costs taxed against respondent.

Dated: April 10, 1973.

By the Court,

(Illegible) M. ADAMS
Circuit Judge

Attest:

THOMAS E. QUINN

Certified as a true copy and issue in lieu of a formal mandate on May 2, 1973.

Costs taxed in favor of petitioner as follows:

Brief & Appx. for petitioner $743.45

Test:

THOMAS E. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Decision and Order of National Labor Relations Board.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

S. E. NICHOLS SHILLINGTON CORP.,

Respondent.

On November 8, 1971, Trial Examiner Paul Bisgyer issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings,[1] and conclusions and to adopt his recommended Order.

[1]The Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, S. E. Nichols Shillington Corp., Shillington, Pennsylvania, its officers, agents successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C., January 28, 1972.

NATIONAL LABOR RELATIONS BOARD

Edward B. Miller,
Chairman

John H. Fanning,
Member

Ralph E. Kennedy,
Member

[Seal.]

[Issued November 8, 1971]

Trial Examiner's Decision.

Statement of the Case

PAUL BISGYER, Trial Examiner: This proceeding, with all the parties represented, was heard on August 10 and 11, 1971 at Reading, Pennsylvania, on the complaint of the General Counsel issued on June 25, 1971,[1] and the answer of S. E. Nichols Shillington Corp., herein called the Respondent or Company. The question litigated is whether the Respondent, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act as amended,[2] discriminatorily discharged employee Rosemary Stamm because of her union or other concerted activities. At the close of the hearing, the parties waived oral argument but thereafter submitted briefs in support of their respective positions.

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[1]The complaint is based on original, first, second, and third amended charges filed on April 13, 22, May 19 and June 24, 1971, respectively. Copies of these charges were duly served on the Respondent by registered mail on the respective filing dates.

[2]Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Insofar as pertinent, Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8(a)(3), with certain qualifications not material herein, prohibits an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

Upon the entire record, and from my observation of the demeanor of the witnesses, and with due consideration being given to the arguments advanced by the parties, I make the following:

Findings and Conclusions

I. *The Business of the Respondent*

The Respondent, a Pennsylvania corporation with its principal office in Shillington, Pennsylvania, operates a retail discount department store at that location. In the regular course and conduct of its business the Respondent's annual gross sales exceed $1,000,000. It also annually purchases and receives from outside the State goods valued in excess of $50,000.

I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

It is conceded, and I find that Retail Clerks, Employees Union, Local 1393, Retail Clerks International Association, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Alleged Unfair Labor Practices*

A. The Evidence

This is another one of those familiar cases where the employer is charged with attempting to stem the organizational tide by unlawfully terminating the leader in the union movement, while the employer protests his inno-

cence, insisting that the discharge was motivated solely by legitimate business reasons. On the basis of the evidence presented, I find the allegations of discrimination sustained.

1. Stamm's employment; the commencement of union activities

Rosemary Stamm was hired by the Respondent in December 1970 as a cashier on the night shift.[3] Her hours were from 5 to 10 p.m. Monday through Friday and from 1 to 10 p.m. on Saturday. In February 1971,[4] Stamm was assigned additional functions previously performed by Shirley Laman, the night head cashier who left the Respondent's employ. These duties included verifying customer checks and charges; supplying cashiers with change; checking out registers; authenticating "voids"; releasing cashiers from their stations and seeing that receipts were brought to the office at the close of the business day; arranging for rest breaks; and training new cashiers. She was instructed in these fuctions by Jean Ann Nyman, the head office cashier, who informed her that Store Manager Murray Jacobs was pleased with her performance and thought that she was qualified to take on the indicated new duties.[5] On April 7, Stamm

[3]Stamm also had responsibilities with respect to the operation of the candy counter.

[4]Unless otherwise indicated, all dates refer to 1971.

[5]These findings are based on the persuasive testimony of Stamm and Sharon DeLong, who was a cashier during Stamm's employment. Neither Jacobs' denial that Stamm was assigned head cashier functions nor Nyman's denial of knowledge that Stamm was performing them impresses me as coming from candid witnesses. Moreover, it is hardly likely that DeLong, who is still in the Respondent's employ, would bear false testimony against her employer and thus invite its ill will. *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2.

was, nevertheless, summarily discharged under circumstances related below.

Because of her dissatisfaction with the wages, hours and other working conditions in the store, Stamm discussed the situation and the desirability of union representation with the employees on the night shift. Receiving a favorable response from a majority of those employees, Stamm on March 29 telephoned the Union and advised its president of the employees' union interest. The next day, Organizer Eugene Nissley visited Stamm at her home, gave her union authorization cards and booklets and instructed her in the technique of soliciting card signatures from employees. About 4:30 in the afternoon, before she was scheduled to begin work, Stamm arrived at the store and in the employee cloakroom succeeded in securing 23 signed cards from employees as they arrived for work. Having thus exhausted her supply of cards, Nissley on Monday, April 5, furnished her with more authorization cards.

2. The events of April 6

On the morning of April 6, Store Manager Murray Jacobs left the store to attend a seminar in Lancaster, Pennsylvania. Upon learning this, Robert Soto, the manager of the leased shoe department, telephoned Stamm at her home about 11:30 a.m., informed her of Jacob's absence and that he (Soto)[6] and other day shift employees were interested in having a union and suggested that she come to the store. Accordingly, about noontime, Stamm arrived there and proceeded to solicit card signatures at the snack bar and work stations from employees, some of whom Soto indicated were likely

[6]Soto had previously expressed his reluctance to become involved in the union movement when Stamm sought his support and assistance in organizing the day shift employees.

prospects. When discussing the Union with clerks in the selling areas, Stamm credibly testified without contradiction, she was careful that there were no customers around to be waited upon. Soto also engaged in this organizational effort, securing a number of signed cards which he turned over to Stamm. By the time Stamm left the store that afternoon she had collected 25 to 30 signed cards.

In the course of the foregoing activities some 10 to 15 employees gathered in the receiving room which is separated from the public areas of the store. Several of these employees had left their work stations on the selling floor to be present while others were in the receiving room or were passing through in connection with the performance of their regular duties. Probably other employees on their lunch period were also there. The number in the group at any particular time, however, varied as some left and others entered the room. Whether or not Stamm and Soto deliberately convened this meeting and invited employees to attend,[7] it is quite clear that they were responsible for it. Manifestly, there was nothing secretive about this meeting which appears to have been more in the nature of a question and answer period where Stamm and Soto explained the advantages of unionization in response to questions put to them. This meeting lasted 10 to 20 minutes and no employee was reprimanded for leaving his or her work station unattended. After this meeting, Stamm resumed her solicitation in the store until her departure about 1 or 1:30 p.m.

The above events were promptly reported the same afternoon to the Respondent's executive offices in New

[7] In view of my findings and conclusions, it is unnecessary to determine whether Stamm and Soto had actually assembled these employees which they denied they did in contradiction of other testimony.

York and then to Store Manager Jacobs while he was still in Lancaster. The testimony relating to these reports was given by Jacobs, the only witness produced by the Respondent, and is as follows: While still in Lancaster Jacobs received two telephone calls, urging him to return to the store immediately because there were "meetings and disruptions." One call was from Alma Dietrich, then an employee in the Shillington store office, who simply relayed a message to Jacobs that he was wanted back in the store. The second call came from Gerald Holt, the area supervisor of ladies', men's and children's wear departments. Holt works out of the New York offices and occasionally visits the Shillington store. Stating that he was making the call on behalf of Company President Rosenbaum, Holt told Jacobs that he should immediately return to the store because "all hell was breaking loose—or something to that effect"; that union organization "meetings" were being held in the back stockroom; that employees were off the floor; and that store operations were being disrupted. Although earlier in his cross examination Jacobs denied that Holt mentioned that Stamm or any other person was involved in the organizational activities or attended "the meetings" or that Stamm solicited cards or discussed the Union in the store, he later testified that Holt told him that Soto "was behind" the union organizational drive and was at the meeting. As for Stamm's union activity, so Jacobs testified, he first learned about it after he returned to the store from Lancaster and was unhappy with this development. However, in subsequent testimony, Jacobs stated that Holt informed him in the above telephone conversation that Stamm and Soto, were the two "principals" who "were leading the meetings." Concerning the reports of the above episode made to the Respondent's executive offices in New York, Jacobs testified that in the same telephone conversation Holt ad-

vised him that he had previously conveyed the information to President Rosenbaum in New York after Juanita Wentzell, an area supervisor who was then visiting the store, called him at home and apprised him of the situation.

Jacobs further testified that after the second telephone call he left Lancaster, arriving at the store between 3:30 and 4 in the afternoon, at which time Stamm and Soto had already gone. He also testified that he then received reports from his assistant managers, Wentzell, and several employees, that in his absence Stamm and Soto had been "conducting meetings in the stockroom" and that employees were off the floor.[8] However, he testified, his informants did not furnish him with details regarding the meetings and dislocations or the duration of the employees' absence from their work stations. Admittedly, Jacobs did not reprimand any employee for leaving his or her station to attend a meeting. In fact, he denied knowing who attended the meeting except the two "principals," Stamm and Soto. Furthermore, there is no direct, convincing testimony that Stamm's and Soto's union solicitation and discussions in the store caused any serious disruption or dislocation of store operations. Indeed, if they did, it is difficult to understand why the persons in charge of the store in Jacobs' absence or other supervisors did not take measures to halt such conduct. According to the head office cashier, Jean Ann Nyman, who unquestionably was unsympathetic to the union organizational campaign, testified that when she reported the afternoon happenings to Jacobs, he simply

[8]According to the testimony of DeeDee Schillermann, the manager of the ladies' and girls' wear department, she told one or two girls in her department that Stamm and Soto wanted to talk to them in the receiving room. This information was passed on to other employees in this department. Schillermann and apparently other employees in that department joined the group in the receiving room.

commented "Don't worry about it. These things happen."

In the evening (April 6), Stamm came to work as usual. However, according to her uncontroverted testimony, which I credit, Jacobs personally kept her under surveillance, following her wherever she went, including to the door of the ladies' room. She further credibly testified without contradiction that, while working at her cash register, one of the security guards approached her, patted her clothes pocket which contained union cards, and cautioned her that she "better not let Mr. Jacobs see [the cards] . . . He's watching you." Nevertheless, during her break at the snack bar Stamm secured additional signed cards from a few employees.

3. The involvement of the New York office in Stamm's discharge

It is disputed that the Respondent's executives in the New York offices, including President Rosenbaum, Executive Vice President Manfred Brecker, and Vice President Keller were fully conversant with Stamm's and Soto's organizational activity in the Shillington store during the afternoon of April 6. Later in the evening Jacobs received a long distance telephone call from Brecker in New York to discuss the subject of discharging Stamm.[9] Jacobs gave the following account of this conversation:[10] Brecker asked Jacobs whether he had been aware of Stamm's organizational activity. When Jacobs responded in the negative, Brecker retorted that he "was very remiss as store manager in not having knowledge of some of these things that went on under—[his] roof." In discussing Stamm's employment status, Brecker pointed out that she was a security risk who had previously con-

[9]It appears that Soto was discharged by his employer, the lessee of the store's shoe department, on April 6 or 7.

[10]Brecker did not testify, nor did any other company executive in the New York office.

fessed to giving unauthorized discounts and taking candy for her own use. Jacobs further testified that, although Area Supervisor Katz had 3 weeks before Stamm's discharge advised him that Stamm was a security risk, this was the first time he learned the details. The facts of this accusation will be later considered.

According to Jacobs, the final discharge decision was made the following day, April 7. It is clear that the decision emanated from the New York executive offices and that Jacobs' participation was apparently to agree that this action was "long overdue." Jacobs conceded that he did not initiate the discharge, even though as store manager he had the power to terminate store employees.

Jacobs testified that on April 7 Vice President Keller visited the store and instructed him to discharge Stamm. He further testified that Keller told him that "the biggest reason" for Stamm's dismissal was the fact that she was a security risk, adding another reason that "to a great extent" she caused disruption of the store operation the day before when "most of the staff" left their work stations to attend the organizational meeting. Admittedly, Stamm was never given the opportunity to answer these charges.

4. Stamm's discharge on April 7; the Respondent's reasons asserted at the hearing

On April 7, at 5 p.m., Stamm reported for work on her regular shift. While hanging up her coat in the cloakroom, she was paged over the intercommunication system to go to the office. There she met Jacobs who asked her to enter the conference room. Stamm expressed her reluctance to do so, stating that anything Jacobs had to say to her could be said in the office. This evoked Jacobs' angry response that he hoped she

had a good lawyer. Stamm, nevertheless, proceeded to the conference room where Jacobs told her that company rules did not permit the employment of relatives and that she therefore had to go. Stamm protested her selection and pointed out that she had been in the Company's employ longer than her sister-in-law, Linda Stamm. Besides, Stamm noted, a sister and brother, Susi and Mike Warner, were then working in the store. Jacobs answered that this was none of her business and Stamm walked out of the conference room and went to the snack bar.[11]

At the snack bar, Stamm heard the Warners being paged. A few minutes later the Warners left the conference room. Susie Warner was in tears when her brother approached Stamm and accused her of causing Susie's discharge.[12] Stamm disavowed responsibility.

At the hearing, Jacobs admitted telling Stamm that she was being separated because of the Company's "no relative" rule. However, he testified that this was not the true reason. When questioned why he gave Stamm a false reason, Jacobs testified that he was "a coward"; that he "didn't want to start a commotion by going into details"; and that he "thought the best way to solve the situation was to invoke the relationship rule." However, this leaves unexplained the separation of Susie Warner under this alleged rule except to suggest that it was

[11]The foregoing findings are based on Stamm's testimony. Jacobs did not contradict Stamm's account except that he denied that he stated that he hoped she had a good lawyer. I find Stamm to be a more credible and candid witness than Jacobs who demonstrated his unreliability, among other things, in his highly dubious testimony regarding the reasons for Stamm's discharge discussed below.

[12]Stamm testified that she later learned that Susie Warner was transferred to the Antietam Valley store. No contradicting testimony was adduced.

prompted by a desire to lend an air of legitimacy to Stamm's discharge.[13]

After staying at the snack bar for a short while, Stamm made a telephone call to Union Organizer Nissley and reported her discharge. Thereafter, when Area Supervisor Holt began to follow her in the store, Stamm invited him to walk with her. Holt then told her that he had to ask her to leave, adding that she knew why; that "[t]here's things going on" in which he did not want to get involved; that she was a "good worker" and "a nice person"; and that it was "nothing personal." Stamm agreed to leave, and Holt took her to the snack bar and bought her a soda. While there, Vice President Keller approached and angrily reminded Holt that he had directed him to get Stamm out of the store. Holt answered that Stamm wasn't doing anything and was going to leave peacefully as soon as she finished her soda. Keller remained at the snack bar until Stamm departed.

Although the discharge obviously originated in the Respondent's New York executive offices, Jacobs was the only management witness to attest to the asserted underlying reasons for this action, namely, Stamm was a security risk; she caused a disruption of store operations on April 6; and her repeated unauthorized absences from her regular cashier's post at the checkout counter. As for Stamm's purported designation as a security risk, the undisputed facts are contained in Stamm's following testimony: In accordance with her agreement noted in her employment application, Stamm submitted in January to an interview and polygraph test conducted

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[13]According to the undisputed testimony of employee DeLong, at a company meeting of employees on April 7 or 8, a management official also stated, in answer to an employee's question, that Stamm was terminated because of the company rule prohibiting the employment of relatives of employees.

by Lincoln Zohn for the Respondent. After preliminary interrogation and testing, the examiner told her that because of her nervousness no valid results could be achieved and that therefore he would forego the polygraph test. In the interview, Stamm freely admitted that at one time while cleaning up candy shelves, which was one of her assigned duties, she found a half-empty bag of candy. After making an appropriate notation in a markup book, she shared the candy with several cashiers. The examiner expressed his opinion that this was not stealing. Stamm also told him that she once gave an unauthorized discount. The examiner assured her that these admissions would not affect her job and that she need not worry. At the examiner's request, she signed a statement containing her admissions and the interview ended. Nothing was said to her thereafter concerning her acts in question or the necessity for taking another polygraph test.[14]

As indicated above, Jacobs testified that on April 17, when he was instructed by Vice President Keller to terminate Stamm, he was advised that Stamm's being a security risk was "the biggest reason" for this action. Jacobs further testified that about 3 or 4 weeks before the discharge, he was orally informed by Area Supervisor Katz for the first time that she was a security risk but that he was given no details regarding the basis for this designation. Under cross examination, it developed that at that time he was given a list of about half a dozen "[s]ecurity risk employees that were scheduled for dismissal" and that all but Stamm were discharged before April 6. When questioned why she was

[14]At the hearing, the Respondent's counsel stated that one ground for discharging Stamm was the Company's belief that she was a security risk because of her refusal to submit to a polygraph examination. However, not only was no evidence presented to substantiate this assertion, but the record establishes the contrary to be the fact.

retained during the 3 or 4 week period, Jacobs testified that it was to keep her under surveillance "as a means of leading us to other employees who might be involved with her." Yet, since Jacobs concededly was not informed why Stamm was considered a security risk, her asserted retention for surveillance purposes while the other listed security risks were discharged is highly questionable. Moreover, although Jacobs admitted that he had no evidence that Stamm had repeated the alleged offenses which made her a security risk, she was nevertheless subsequently discharged.

The transparency of the security risk reason for Stamm's termination requires no further discussion. Indeed, the Respondent in its brief realistically discounts the security risk ground in observing that "the polygraph report, while justifying unusual surveillance, did not produce anything of substance against Stamm." As for my appraisal of Jacob's testimony, I do not believe that the Respondent ever regarded Stamm a security risk or that she was kept under surveillance for that reason.

With respect to Stamm's asserted disruption of store operations on April 6, this has already been discussed earlier in this Decision. Turning then to the final reason for Stamm's discharge, her alleged unauthorized absence from her assigned station at the cash register, the Respondent presented such a dismal picture of her neglect of duties which, if true, leaves one perplexed why it had not gotten rid of her sooner.[15] Moreover, if she were actually guilty of these derelictions, and they really

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[15]In its brief, the Respondent acknowledges the understandable doubt that Stamm's neglect of duties really motivated her discharge. Thus, the brief states that "the employer knowing of her neglect for a long period of time did not act on it previously, so that taken alone it does not appear to be the reason for discharge." However, it argues that Stamm's neglect of duties "taken in conjunction with the disruption of store operations amply justifies discharge."

prompted the discharge, it is incomprehensible why Jacobs should have failed to inform Stamm at her discharge interview of such fact.

In any event, Jacobs recited the following account of Stamm's neglect of duties: For at least several weeks before her dismissal, Stamm failed to perform her job at the cash register. She would wander around in the store, requiring him "frequently" to page her to return to her register at the checkout counter. This happened approximately three times an evening, despite the fact that he had admonished her that her business was to be at her register and not to leave it except for breaks and "under . . . [his] direction." As time went on, Jacobs' warnings to Stamm became more severe. He probably verbally warned her four or five times but could not remember the nature of those reprimands. On some occasions of her absence from her register, he asked her for the reason she was away but could not recall the most recent date of such inquiry. However, he recalled that when he found Stamm in the shoe department a week before her discharge, he questioned her about her absence and ordered her to return to her register. Jacobs testified that he kept no written record of Stamm's reprimands or unauthorized absences; nor did he have records of any employee's performance.[16]

Also testifying on the Respondent's behalf was Jean Ann Nyman, the head office cashier, who I find was hostile to the Union[17] and inclined to gross exaggeration. She testified, in substance, that her workday began 8 o'clock in the morning but she usually worked to 7, 8 or 9

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[16]Because of the absence of written records of this nature, Jacobs indicated that the New York executive offices would have no knowledge of Stamm's performance.

[17]Although not contended to be a supervisor within the meaning of the Act, Nyman enjoys a position of responsibility with respect to employees. About noon on April 6, in response to the Union's organizational drive, Nyman initiated and drafted

o'clock in the evening and thus had an opportunity to observe Stamm's work habits on the night shift. According to Nyman, Stamm was a fine cashier until the middle of January when she began leaving her register to walk around the store or sit at the snack bar. Before Stamm developed these bad habits, she (Nyman) had intended to recommend Stamm to Jacobs as a replacement for the night head cashier who had left the Company's employ. Nyman testified that she did not make the recommendation because of Stamm's repeated delinquences in "never" being at her register; that she wandered around in areas where she had no right to be and "constantly" had to be called back; that for 2 or 3 weeks before her discharge, Stamm was called back to the register "several times"—"four or five times, six, seven, eight, nine times a night"—and, on occasions after returning, she would leave again, necessitating her being paged again; that throughout February and March several cashiers and office employees complained to her (Nyman) about Stamm's absences; that she reported Stamm's conduct and employee complaints to Jacobs who stated that he would observe Stamm; and that one day in the middle or end of March, Nyman also spoke to Stamm about her wanderings which griped employees with the result that her conduct only worsened.

(footnote continued):

a petition that the employees "did not wish to be part of any Union organization" and thereafter solicited and secured some 50 employee signatures. She also furnished employees advice on sending individual letters to the Union, requesting return of their previously signed authorization cards. According to the testimony of DeeDee Schillermann, the department manager of ladies' and girls' wear whom the Respondent produced as a witness, she and several other employees gave Nyman the withdrawal letters they had written to be forwarded to the Union by certified mail, without affixing postage stamps. The complaint, however, does not allege that the Respondent violated the Act by reason of Nyman's conduct.

The testimony of Carol L. McElwee, a former employee and witness for the Respondent,[18] was in the same general vein. According to her, Stamm was "frequently" in the shoe department and soft goods department areas in the rear of the store where she overheard conversations between Stamm and Soto. McElwee further testified that these conversations occurred at least once a night and sometimes more often; that Stamm's wanderings began in December when Stamm was first employed and remained away from her work stations until paged to return; that she (McElwee) heard Stamm being paged at least every night with its frequency increasing as time went on; and that she (McElwee) on several occasions complained to management that Stamm was talking in the rear of the store and was disturbing employees working there.

Disputing the foregoing recitation of her derelictions, Stamm testified, in effect, that her absences from the register were in connection with the performance of her duties or when she was on a break and referred to three such incidents. One incident involved the handling of a refund about 4 weeks before her discharge. According to Stamm, she took care of the refund in the rear of the store, at Nyman's direction, when Jacobs paged her to return to the checkout counter to approve a check. In the office, Jacobs reprimanded her for running around in the store. When Stamm explained her presence in the rear of the store, Jacobs turned to Nyman who answered that she told Stamm to have somebody else handle the refund.

[18]Although McElwee also enjoyed a position of responsibility over employees while she was in the Respondent's employ, it is not urged that she was a supervisor within the meaning of the Act. She admitted that employees tried to keep knowledge of the Union's campaign from her because they considered her unfriendly as to the Union.

The second occasion she was paged, Stamm testified, was when she went to the ladies' room. As for the third incident, Stamm testified that she went to the jewelry counter after she was called by a salesgirl to show her how to make out a charge; that while she was explaining the procedure, she was paged; and that when Stamm informed Jacobs the reason for being at the jewelry counter, Jacobs told the salesgirl that if she needed assistance in preparing a charge, to go to the office. Stamm also testified that she was never warned that she risked discharge or other consequences if she persisted in absenting herself from the register.

Employee DeLong, who worked as a cashier near Stamm, substantially corroborated Stamm's testimony in various respects. She testified that Stamm was not absent from her register too often, probably three or four times, but did not know the purpose of those absences. She further testified that Stamm did not operate a register at times when she was engaged in performing other duties, such as checking coupons, getting change for the cashiers or signing "voids" or charges. In addition, DeLong denied that she ever complained about Stamm's absences from the register nor, to her knowledge, did the other cashiers complain.

From my appraisal of the testimony in the context of all the circumstances related above, I find that the testimony of Jacobs and other company witnesses concerning Stamm's delinquencies was greatly exaggerated and beyond reasonable belief. I seriously doubt that if her conduct were as bad as it was pictured to be Jacobs would have retained her as long as he did or that he would not have mentioned her shortcomings at the time of her dismissal. Accordingly, I credit Stamm's and DeLong's testimony. In any event, as I later conclude, whatever estimate the Respondent might have had of Stamm's work habits or performance, it did not enter into its decision to discharge her.

5. Stamm's subsequent evictions from the store

On April 10, Rosemary Stamm and her husband visited the store to purchase a pair of shoes for their child. While their child was being fitted, Store Manager Jacobs approached and asked them to leave. When Stamm's husband protested that there was no reason for this request, Jacobs responded that Rosemary was a union organizer, and that he was going to call the police unless they left. After Jacobs walked away, two security guards informed the Stamms that Jacobs wanted them out of the store. Asserting their constitutional right to shop in the store, the Stamms nevertheless departed.

On April 15, pursuant to prior arrangement with the Union's attorney, Joseph E. Organtini, constable of the Township of Cumru, accompanied Rosemary Stamm and her husband on another visit to the store. The following is Organtini's version as corroborated in substantial respects by Rosemary Stamm. The Stamms first bought a carton of cigarettes at the tobacco counter and proceeded to the dry goods department. While Rosemary Stamm was examining a dress pattern, a security officer appeared and ordered the Stamms to leave the store. Organtini identified himself and inquired whether the Stamms had done anything wrong. When the security officer answered that he was only acting on orders from Jacobs, Organtini asked to speak to Jacobs and was directed to him at the front of the store. There, with the Stamms standing nearby, Organtini introduced himself and stated that he accompanied the Stamms to the store at the request of the Union's attorney. Organtini then inquired whether the Stamms had done anything wrong to be ordered out of the store. Receiving Jacobs' reply that Rosemary Stamm had been discharged, Organtini asked whether the discharge was for shoplifting, stealing or anything like that. Jacobs gave a negative re-

sponse, adding that she was discharged because she was a union organizer. This elicited Organtini's expression of doubt that such activity was unlawful. At that point, a town police officer appeared at the scene. Organtini advised the officer the purpose of his mission, which was to protect the Stamm's civil rights. Organtini then stated that if the police officer wanted the Stamms to leave they would do so peacefully. When Jacobs affirmed that was his wish, the Stamms and Organtini left the store.

Jacobs' account of this incident is essentially the same except that he categorically denied telling Organtini that Rosemary Stamm was discharged because she was a union organizer. According to Jacobs, he said he wanted her to leave the store because she was "a known organizer." Concerning the reasons for her termination, he testified, he told Organtini that they were for "an infraction of the rules and we were not permitted to employ relatives in the store." As previously indicated, Jacobs did not impress me as a reliable witness. Organtini's testimony, corroborated by Rosemary Stamm's, was very persuasive, and I accordingly credit. In any event, even were Jacobs' testimony credited in this respect, my ultimate determination would be the same.

Under cross examination, Jacobs admitted that at the time of the Stamms' eviction from the store, they had not caused any disruption of operations but that his action was taken "on advice of counsel and other executives." There is also undisputed testimony that 2 or 3 weeks later Rosemary Stamm experienced another ungracious invitation to leave the store. On that occasion, she and a union organizer entered the store and while they were having a soda at the snack counter, Jacobs directed them to leave, which they did.

B. Concluding Findings

The question whether an employee was illegally discharged because of his union activities is not susceptible of easy determination as it involves an inquiry into the employer's state of mind. In resolving this question, therefore, all the facts and circumstances surrounding the separation must be carefully appraised with due recognition being accorded to the settled principle that an employer may terminate an employee for any reason, good, bad, or indifferent, provided he is not motivated by union considerations. It is equally well established that the existence of a "justifiable ground for dismissal is no defense if it is a pretext and not the moving cause."[19]

From my analysis of the evidence, I am convinced that Stamm's discharge was dictated by her leadership in the Union's organizational drive and not by the reasons advanced by the Respondent. As shown above, there can be little doubt that the Respondent became aware of Stamm's union activities on April 6, the day before her termination, and that it did not welcome the prospect of its store being unionized. It is also clear that, upon learning of Stamm's activities, the Respondent's executives in its New York offices promptly initiated steps to terminate her the following day. In a conceded effort to conceal the real reason for her discharge, Store Manager Jacobs falsely informed Stamm in her exit interview that he was simply enforcing a company rule prohibiting the employment of relatives of employees. However, when she pointed out that she had entered the Respondent's employ before her sister-in-law, and that a brother and sister, Susie and Mike Warner, were then working in the store, Jacobs retorted that it was none

[19] *N.L.R.B. v. Solo Cup Company*, 237 F. 2d 521, 525, (C.A. 8).

of her business. The transparency of the reason thus given to Stamm for her discharge probably induced Jacobs to retract it on the witness stand and acknowledge its pretextual nature. However, his explanation for giving Stamm a false reason—that he lacked the courage to tell her the truth—only serves to cast graver doubts on the purity of the motivation underlying the discharge. Not only am I unable to discern anything in the assertedly honest reasons for the discharge requiring secrecy or confidentiality, but the inexcusable extreme to which Jacobs went in dismissing an innocent employee, Susie Warner, in an effort to lend an air of legitimacy to his purported enforcement of the "no-relative" rule,[20] strongly suggests that impermissible considerations entered into the discharge decision.

Turning to the discharge reasons urged at the hearing—that Stamm was a security risk, neglected her duties in frequently absenting herself from her station at the cash register, and disrupted store operations on April 6,—I find that they, too, cannot withstand scrutiny. As found above, the Respondent actually never regarded Stamm as a security risk, even though Jacobs testified that he was advised by Vice President Keller that this was "the biggest reason" for the discharge. Indeed, in its brief, the Respondent concedes that the polygraph report "did not produce anything of substance against Stamm."

As for Stamm's asserted neglect of duties, it is difficult to understand why, if her conduct were really as intolerable as it was pictured to be, she was retained in the Respondent's employ as long as she was, without even a warning that she risked discharge unless she mended her ways. The inescapable answer for her retention is that actually she was not an unsatisfactory em-

[20]Apparently to make amends for the injustice done to Susie Warner, the Respondent subsequently reinstated her in its Antietam Valley store. A similar offer was not made to Stamm.

ployee but that, by more than a strange coincidence, she became *persona non grata* only when her union activities became known to the Respondent.

Conceding that Stamm's derelictions do not appear to be a justifiable ground for her discharge in view of the Respondent's toleration of this conduct for a long period of time, the Respondent argues that Stamm's neglect of duties considered in conjunction with her disruption of store operations on April 6, nevertheless warranted the discharge. However, I am not convinced that the Respondent believed that Stamm caused such a serious disruption in the store as to compel her summary discharge in the middle of the workweek, without prior warning or desire to learn her version of the April 6 events. Significantly, neither the so-called disruption nor her asserted neglect of duties was even given to Stamm as a reason for her discharge; instead, Jacobs admittedly attempted to justify his action to Stamm on the basis of a pretextual reason. Such a deliberate effort to hide the true motivating reason clearly supports the inference that Stamm's alleged acts of misconduct are merely afterthoughts and that her discharge was really inspired by her union activities.[21]

Weighing all the evidence including the timing and summary nature of Stamm's discharge,[22] the involvement of the Respondent's executives in New York in a disciplinary matter ostensibly of local concern, the assignment of pretextuous reasons for the discharge, and the Respondent's purposeful efforts to conceal its real motive, I conclude that the Respondent discriminated against

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[21] *Winchester Spinning Corporation v. N.L.R.B.*, 402 F. 2d 299, 306, (C.A. 4) in which the court observed that "[w]here an asserted business motive is discredited or contradicted by substantial evidence, the Board is free to treat it as pretextuous and infer discrimination on account of union activity."

[22] *N.L.R.B. v. Montgomery Ward & Co., Inc.*, 242 F. 2d 497, 502 (C.A. 2), certiorari denied 355 U.S. 829.

Stamm because of her union activity. Such conduct, I find, necessarily discouraged union membership in violation of Section 8(a)(3) of the Act and interfered with, restrained and coerced employees in the exercise of their self-organizational rights in violation of Section 8(a)(1) of the Act. The validity of these findings is buttressed by Jacobs' admission to Constable Organtini at the time of Stamm's eviction from the store on April 15 that she was discharged because she was a union organizer. Finally, even assuming that Stamm's alleged neglect of duties and disruption of store operations to some extent entered into the Respondent's decision to terminate her, I, nevertheless, find that a significant factor causing her discharge was her leadership in the union movement and that therefore her discharge would still be violative of the same provisions of the Act.[23]

IV. *The Remedy*

Pursuant to Section 10(c) of the Act, as amended, I recommend that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found and take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Respondent unlawfully discharged employee Rosemary Stamm because of her union activiy. To remedy this violation, I recommend that the Respondent offer her immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by

[23] *N.L.R.B. v. Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *Winchester Spinning Corporation v. N.L.R.B.*, *supra*, 304; *N.L.R.B. v. Historic Smithville, Inc.*, 414 F. 2d 1358, 1361 (C. A. 3).

reason of the discrimination against her by payment to her of a sum of money equal to that which she normally would have earned from April 7, 1971, the date of her discharge, to the date of the offer of reinstatement, less her net earnings during the said period. Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 N.L.R.B. 289-294, and *Isis Plumbing & Heating Co.*, 138 N.L.R.B. 716. To facilitate the computation, as well as to clarify the named employee's rights to reinstatement, the Respondent shall make available to the Board, upon request, payroll and other records necessary and appropriate for such purposes. The posting of a notice is also recommended.

In view of the nature of the discrimination for union membership and activity which "goes to the very heart of the Act,"[24] there exists the danger of the commission by the Respondent of other unfair labor practices proscribed by the Act. Accordingly, I recommend that the Respondent be ordered to cease and desist from in any other manner infringing upon the rights guaranteed employees in Section 7 of the Act.[25]

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[24] *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4).

[25] *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 433.

3. By discriminating in regard to the hire and tenure of employment of Rosemary Stamm to discourage membership in, and activities on behalf of, the Union, the Respondent has engaged, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing conduct, the Respondent interfered with, restrained and coerced employees in the exercise of their statutory rights within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:[26]

ORDER

The Respondent, S. E. Nichols Shillington Corp., Shillington, Pennsylvania, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Retail Clerks, Employees Union, Local 1393, Retail Clerks International Association, AFL-CIO, or any other labor organization, by discharging employees or discriminating against them

[26]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Rosemary Stamm immediate and full reinstatement to her former job, and if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in analyzing the amount of backpay due and the right to reinstatement and employment under the terms of this recommended Order.

(c) Post at its store in Shillington, Pennsylvania, the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4 in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.[28]

Dated at Washington, D. C., November 8, 1971.

/s/ PAUL BISGYER
PAUL BISGYER
Trial Examiner

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[27]In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall be changed to read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

[28]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith."

Appendix.

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

The Act gives all employees the following rights:

To organize themselves.

To form, join or support unions.

To bargain as a group through a representative they chose.

To act together for collective bargaining or other mutual aid or protection.

WE WILL NOT discharge or layoff any employee or otherwise discriminate against him or her because of his or her membership in, or activities on behalf of, Retail Clerks, Employees Union, Local 1393, Retail Clerks International Association, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representa-

tives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a) (3) of the Act.

WE WILL offer Rosemary Stamm immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings suffered by reason of the discrimination against her.

All our employees are free to become, remain, or refrain from becoming or remaining, members of Retail Clerks, Employees Union, Local 1393, Retail Clerks International Association, AFL-CIO, or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a) (3) of the Act.

S. E. NICHOLS SHILLINGTON CORP.
(Employer)

Date

By

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1700 Bankers Securities Building, Walnut & Juniper Sts. Philadelphia, Pa. (Tel. No. 215-597-7601).

[Issued December 7, 1971]

ORDER

On November 8, 1971, Trial Examiner Paul Bisgyer of the National Labor Relations Board issued his Decision in the above-entitled proceeding and, on the same date, the case was transferred to and continued before the Board in Washington, D. C. The Trial Examiner found that the Respondent has engaged in certain unfair labor practices, and recommended that it take specific action to remedy such unfair labor practices.

No statement of exceptions having been filed with the Board, and the time allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Board hereby adopts the findings and conclusions of the Trial Examiner as contained in his Decision, and orders that the Respondent, S. E. Nichols Shillington Corp., its officers, agents, successors,

and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D. C., December 7, 1971.

By direction of the Board:

/s/ GEORGE A. LEET
GEORGE A. LEET
Associate Executive Secretary

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-223

S. E. NICHOLS SHILLINGTON CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

We invite the Court's attention to the following facts, which show that the petition for a writ of certiorari was filed out of time.

The judgment of the court of appeals (Pet. App. 4-5) was entered on April 10, 1973. The 90-day period for filing a petition for a writ of certiorari, prescribed by 28 U.S.C. 2101(c), expired on July 9, 1973, and no extension of time was sought or granted. The petition was filed on August 2, 1973.

The petition is thus untimely, the Court has no jurisdiction to entertain it, and it should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

AUGUST 1973.

DOJ-1973-08